

1 a psychologist?

2 A. Well, I concluded that he was in the  
3 borderline to mildly retarded level of retarded  
4 function as reflected by previously psychometric  
5 measures, that the current testing reflecting he  
6 had evidence of impaired higher cortical  
7 functions. That means brain function, such as the  
8 ability to reason abstractly, problem solve, and  
9 plan while other functions remain well intact such  
10 as language.

11 Q. You mentioned testing you performed  
12 on Mr. O'Neal back in 1994, did you personally  
13 take Mr. O'Neal through an IQ test back at any  
14 time in '94?

15 A. At that time, no.

16 Q. Did you review the results of IQ test  
17 that had been administered to O'Neal back at that  
18 time?

19 A. I did.

20 Q. Who performed that IQ test?

21 A. Dr. Chiappone.

22 Q. Let me take you from 1994 to 2004.  
23 Regarding your work in 2004 in connection with the  
24 issue of whether or not Mr. O'Neal is mentally  
25 retarded, can you describe in general terms for

1 the Court the work that you have performed?

2 A. Yes. Besides again interviewing Mr.  
3 O'Neal -- and this is on December 4th of 2004 -- I  
4 chose to administer two IQ measures. Now, the  
5 Weschsler, W-e-s-c-h-s-l-e-r, Adult Intelligent  
6 Scale 3 is the upgraded version of test that Dr.  
7 Chiappone used in 1994.

8 Typically, when a new test is brought  
9 out, or a new version of a test is brought out, it  
10 has been cleaned up. Items which were not  
11 important before and which did not show to be  
12 discriminatory are dropped. New forms are  
13 established. It's considered to be a more  
14 accurate measure at this point, so I administered  
15 that test.

16 I also wanted a backup measure just  
17 to see, you know, to be, if you will, twice  
18 assured of what I was getting, so I administered  
19 the Reynolds Intelligence Test. That is not near  
20 as popular a test. It's a relatively new test,  
21 but it also assesses some of the same types of  
22 abilities, but it does so in a different manner.

23 Q. Doctor, in addition to this testing,  
24 have you reviewed any records pertaining to Mr.  
25 O'Neal in connection with your evaluation on the

1 issue of whether or not he is mentally retarded?

2 A. Yes, I have.

3 Q. In general, can you tell what records  
4 you have reviewed?

5 A. Probably the most important one was  
6 the psychological evaluation or educational  
7 evaluation performed back when he was in grade six  
8 at age 14. I don't have the date on that.

9 Q. Let me stop you for a second and  
10 approach if I may. Let me hand you what's been  
11 marked as Defendant's Exhibit A. I will give you  
12 a chance to look at that.

13 A. Yes.

14 Q. Do you recognize that, sir?

15 A. Yes, that's a copy of the school  
16 records from the Cincinnati Public Schools'  
17 psychology service.

18 Q. Are those records that you have  
19 reviewed in connection with your evaluation of  
20 whether or not James O'Neal is mentally retarded?

21 A. Yes.

22 Q. Are those records significant in any  
23 way in assisting you with making that  
24 determination?

25 A. Yes. This occurred when he was, as I

1 said before, when he was in Grade 6 at age 14.  
2 The date I believe was 1968. He was administered  
3 the wechsler Adult Intelligence Scale for  
4 Children, which is, if you will, a downward  
5 version of the wechsler scale for adults. This is  
6 again the standard and popular measure.

7 At that time, he obtained a full  
8 scale IQ of 64, which is well into the retarded  
9 range. What was more important to me was the  
10 difference between his verbal skills and what we  
11 call nonverbal skills on the wechsler Adult  
12 Intelligence Scale. There is almost a 25 point  
13 split. And that's the type of problems that you  
14 see in children who have not just severe learning  
15 disabilities but problems in brain function. And,  
16 in fact, the psychologist at the time indicated  
17 that the "below intellectual functioning is due to  
18 organic dysfunction, organic impaired brain  
19 function."

20 Q. You mentioned that one of the things  
21 that you did in your more recent work in 2004 in  
22 evaluating Mr. O'Neal on mental retardation was  
23 conduct an interview of Mr. O'Neal. When did that  
24 take place?

25 A. December 4, 2004.

1 Q. Where was the interview conducted?

2 A. In the Hamilton County Justice  
3 Center.

4 Q. On that occasion, how long were you  
5 with James O'Neal?

6 A. Approximately three hours.

7 Q. In connection with the work that you  
8 did in 2004 evaluating the issue of whether or not  
9 James O'Neal is mentally retarded, did you review  
10 the testing that you had performed back in 1994?

11 A. Yes, I did.

12 Q. And back at the time of your 1994  
13 work involving Mr. O'Neal, did you prepare a  
14 written report at that time?

15 A. Yes.

16 Q. Let me show you what's been marked as  
17 Exhibit B, Dr. Tureen, and I'll ask you if you  
18 have seen that before?

19 A. Yes.

20 Q. Please tell us what that is.

21 A. It's a copy of my evaluation which  
22 was sent to Mr. John Keller, who was the defense  
23 lawyer at the time -- one of defense lawyers at  
24 the time.

25 Q. Have you had an opportunity to review

1 that report in connection with your more recent  
2 2004/2005 work pertaining to Mr. O'Neal?

3 A. Yes. In fact, I was earlier talking  
4 about this.

5 Q. Now, back when you interviewed Mr.  
6 O'Neal in 2004, what was the reason that you  
7 conducted that interview?

8 A. Well, the reason was to actually redo  
9 the psychometric testing or IQ testing and see  
10 where he was today.

11 Q. Was that interview significant to you  
12 in the ultimate formulation of your opinion  
13 concerning this issue of whether or not Mr. O'Neal  
14 is mentally retarded?

15 A. Yes. And if I can give the reason,  
16 is that it's a consistent habit of intellectual  
17 performance, which has been established as far  
18 back as grade six.

19 Q. As a psychologist, would you ever  
20 make a determination that someone was mentally  
21 retarded without having conducted an interview of  
22 that person.

23 A. It's my policy not to make a  
24 diagnosis of any individual without personal  
25 contact.

1 Q. Let me show you, Doctor, what has  
2 been marked as Exhibit C. Can you tell what that  
3 is?

4 A. This is a copy of the report that I  
5 sent to the Court as a result of my contact with  
6 Mr. O'Neal on December 4th.

7 Q. What's the date of the report, sir?

8 A. January 18, 2005.

9 Q. And would having the report in your  
10 hand at this point assist you in giving your  
11 testimony?

12 A. Yes.

13 Q. In relation to this issue of mental  
14 retardation of James O'Neal, have you reviewed any  
15 legal authority?

16 A. Yes, I have.

17 Q. What have you looked at?

18 A. Primarily *Atkins versus Virginia*, a  
19 Supreme Court decision handout written by Judge  
20 Stevens. There was also an amicus brief that was  
21 written for the State of Ohio. There is the  
22 statement from the American Mental Retardation  
23 Association, which outlines the definitions of  
24 mental retardation, which is accepted by *Atkins*  
25 and which was supported in the amicus brief.

1 There is also -- there was a report of *Lott versus*  
2 *State of Ohio*.

3 Q. I'm sorry?

4 A. *Lott versus Ohio*.

5 Q. Are you aware, Doctor, of any  
6 criteria that are utilized in making a  
7 determination that a person is mentally retarded?

8 A. The major criteria that I'm aware of  
9 is that which is established by the American  
10 Mental Retardation Association.

11 Q. If you would, please identify what  
12 those criteria are.

13 A. I'm going take this from my report,  
14 which is taken from *The Manual of the American*  
15 *Mental Retardation*, which is entitled, "Mental  
16 Retardation Definition Classification System of  
17 Support."

18 Their particular statements are as  
19 follows:

20 "The disability characterized by  
21 significant limitations both in intellectual  
22 functioning and in adaptive behavior as expressed  
23 in conceptual, social, and practical adaptive  
24 skills and originated before the age of 18."

25 Q. You referenced just a moment ago the



1 American Association for Mental Retardation. What  
2 is that, sir?

3 A. It's a nationally known organization  
4 of -- it's an advocacy organization. It's a  
5 support organization, which has been around  
6 since the 1920s and has established many  
7 guidelines for working with mental retardation and  
8 is nationally recognized.

9 Q. Dr. Tureen, in your experience as a  
10 psychologist, have you dealt with the use of these  
11 criteria before your work in the case of James  
12 O'Neal?

13 A. Yes.

14 Q. When you, as a psychologist, speak of  
15 adaptive behavior, what does that refer to?

16 A. -- talking about the ability to  
17 adjust to the real world in which we live  
18 basically; does one have the skills that are  
19 necessary to function academically, to function in  
20 the work-related world, to function in the legal  
21 world, to function in the social world, to  
22 function interpersonally in a manner that is  
23 successful and not detrimental to them or to  
24 society.

25 Q. You described two tests that you

1 performed in 2004 with Mr. O'Neal, if I recall  
2 correctly, the Weschsler and also the Reynolds  
3 test?

4 A. Yes.

5 Q. If you would, take us through how  
6 the particular tests administered? How are they  
7 given to a subject?

8 A. They are administered directly; in  
9 this instance by myself. It's a face-to-face  
10 administration. That in of itself takes probably  
11 close to two hours for the two tests.

12 Q. When you do those tests -- I know  
13 there are two -- what do those tests measure?

14 A. They measure essentially -- let me  
15 back up. They are broken down into components.  
16 The components are compiled into a full scale or  
17 composite score. What has been demonstrated that  
18 in terms of adaptive functioning, generally  
19 speaking, that full scale or composite score is  
20 the most significant.

21 In other words, if you look at the  
22 Weschsler Adult Intelligence Scale, there are 14  
23 subscales, scales that have to do with: How could  
24 a person do arithmetic? What is their vocabulary?  
25 How well can they do some abstract spacial

1 analysis?

2 Those are all put together to come up  
3 with a final score. That's the final score which  
4 is used as the best assessment of where an  
5 individual is in terms of their general adaptive  
6 capacity.

7 Q. How does that comport with the term  
8 "full scale IQ"?

9 A. That is the same thing on the  
10 Weschsler scale. Other scales call them composite  
11 IQs.

12 Q. Let me take you first to the  
13 Weschsler and then to the Reynolds. If you would,  
14 please tell us or describe what the results of  
15 those tests were from 2004 for James O'Neal?

16 A. The full scale IQ on the Weschsler  
17 was 67.

18 Q. Did you say "67"?

19 A. Sixty-seven. Now, the qualitative  
20 descriptions are a little bit different. You will  
21 find that the newer IQ measures do not like to use  
22 the term "mental retardation." The older ones do.

23 Technically, they describe him as  
24 being that score. "That score" being extremely  
25 low. What it is, is that the first percentile of

1 the general population -- that means 99  
2 individuals who take the test -- do better than  
3 Mr. O'Neal did. Okay.

4 The verbal scale was an IQ of 71,  
5 which is at the third percentile. Again, you can  
6 get an idea that 97 percent of the people do  
7 better.

8 And the performance scale was 69,  
9 which is a measure of more perceptual motor,  
10 hand/eye coordination and visualization skills.  
11 And an important point in looking at these three  
12 numbers from any statistical basis is the numbers  
13 of 67, 69, and 71 are not significantly different.  
14 They all represent very low levels of intellectual  
15 functioning.

16 Q. Let me jump from the wechsler to the  
17 Reynolds testing. What were the results of that  
18 testing that you conducted in 2004?

19 A. The Reynolds breaks down a little bit  
20 differently, but still the composite IQ in this  
21 case was 63, which again is at the first  
22 percentile in this particular case, so we are  
23 getting again a measure of functioning at  
24 basically the lowest level you can in terms of  
25 percentile ranges. That means 99 percent of

1 people function better than this particular  
2 individual.

3 The nonverbal index was 67, and the  
4 verbal index was 68 -- again, scores which are not  
5 significantly different from each other, all low  
6 into what we call the extremely low -- or using  
7 the old term "retarded" -- range.

8 Q. Who actually scored the Weschsler and  
9 Reynolds test that were done of Mr. O'Neal in  
10 2004.

11 A. I did.

12 Q. In arriving at the scores that you  
13 have described for us, did you attempt to do  
14 anything to put Mr. O'Neal's IQ in a particular  
15 range?

16 A. No, I handle this the same as I do  
17 any other scoring task. I have the manuals in  
18 front of me. There are always some answers which  
19 may be questionable to try and resolve those  
20 questions one way or the other.

21 Q. Can a subject of these tests, the  
22 Weschsler and the Reynolds, do something to  
23 intentionally try to score badly or have a low  
24 score on the testing?

25 A. You mean can they?

1 Q. Yes.

2 A. Yes, they can.

3 Q. And as someone who is administering  
4 the tests, is there anything that you do to watch  
5 for that or guard against that?

6 A. Well, you get a sense of the effort.  
7 But there is a more important measure here of  
8 whether or not he tried to do worse, and that's  
9 the consistency of performance since age 14.  
10 There is no variation here.

11 Q. With regard to the Weschsler Adult  
12 Intelligence Scale, the test that you performed on  
13 James O'Neal in 2004, is that a test that is well  
14 recognized in the psychological community?

15 A. Yes. I think I referred to it as the  
16 gold standard of intelligence measure for adults.

17 Q. Dr. Tureen, based upon your  
18 education, training, and experience as a  
19 psychologist and your interviewing and testing  
20 with James O'Neal as well as your review of his  
21 school records, have you formed an opinion to a  
22 reasonable certainty as a psychologist as to  
23 whether or not James O'Neal is mentally retarded  
24 and meets the criteria for mental retardation that  
25 we have previously talked about?

1 A. Yes, I have.

2 Q. What is your opinion, sir?

3 A. That Mr. O'Neal meets the criteria  
4 for mental retardation.

5 Q. What is the basis of that opinion?

6 A. Three bases:

7 One is low IQ scores in the mentally  
8 retarded range;

9 Two is the fact that this has  
10 occurred before the age of 18, as documented by  
11 school records;

12 And three is evidence of impaired  
13 brain function that is going to impact his ability  
14 to function continually efficiently in social  
15 situations, particularly social situations which  
16 are stressful.

17 So he is academically impaired. He  
18 is socially -- there is a social impairment under  
19 specific situations of high stress, and this has  
20 occurred before the age of 18.

21 Q. Let me, if I may, break this down to  
22 the different prongs or different pieces of the  
23 criteria for mental retardation.

24 Based upon your education, training,  
25 and experience, and your interview and testing

1 with James O'Neal, as well as your review of his  
2 scholastic records, do you have an opinion to a  
3 reasonable certainty as a psychologist as to  
4 whether or not he suffers from a disability  
5 characterized by significantly subaverage  
6 intellectual functioning which originated before  
7 he was 18 years old?

8 A. Yes.

9 Q. What is your opinion?

10 A. That, in fact, he suffers from a  
11 disability originating before the age of 18. It's  
12 not only based upon the fact that he was tested at  
13 age 14 and demonstrated sublevels of intellectual  
14 function, but if you look at the academic records,  
15 his performance levels across those records that  
16 were available, again, were at the first and  
17 second percentile compared to the general  
18 population.

19 Q. Based upon your education, training,  
20 and experience and your interviewing and testing  
21 of Mr. O'Neal, as well as your review of his  
22 scholastic records, do you have an opinion, Dr.  
23 Tureen, to reasonable certainty as a psychologist  
24 as to whether or not Mr. O'Neal currently suffers  
25 from a disability characterized by significant



1 limitations in two or more adaptive skills as  
2 expressed in conceptual, social, and practical  
3 adaptive skills, which occurred before he was age  
4 18?

5 A. Yes, I do.

6 Q. What is your opinion?

7 A. That he still suffers from the same  
8 level of conceptual inability, if you will, and  
9 social limitations as he did prior -- in the past.

10 Q. And what particular adaptive skills  
11 does Mr. O'Neal suffer from a significant  
12 limitation of?

13 A. First of all, there is a significant  
14 limitation in academic skills. I would say  
15 reading, math skills, but more importantly is the  
16 limitation as a result of what I initially  
17 referred to as mild cerebral brain dysfunction,  
18 which I believe is the cause of the low level of  
19 intellectual function.

20 Now, that particular type of  
21 disturbance that he demonstrated on our earlier  
22 testing limits his ability to consider alternative  
23 modes of dealing with situations which are  
24 stressful or which he finds in some way  
25 threatening.

1 Q. And I don't have *Atkins* in front of  
2 me, I'm going from memory. Feel free to review  
3 *Atkins* if you have it in your possession. The  
4 reference in *Atkins* to adaptive skills relates to  
5 the following: Communication, self care, home  
6 living, social, community use, self direction,  
7 health and safety, functional academics, leisure,  
8 work. What you have just described, does that  
9 fall into that category of functional academics?

10 A. The functional academics and social  
11 adaptive.

12 Q. How does that fall into the category  
13 of social adaptive?

14 A. This is an individual who is going to  
15 become rigid, perseverative, not able to think of  
16 alternative ways of dealing with situations which  
17 occur particularly under stress.

18 Q. Does it impact the issue of whether  
19 or not Mr. O'Neal is mentally retarded if he meets  
20 two of the ten types of limitations of adaptive  
21 behavior?

22 A. My understanding is that it does.

23 Q. You have provided us with your  
24 opinion concerning whether or not James O'Neal is  
25 mentally retarded. Are there gradations of mental

1       retardation, Doctor?

2               A.       Yes, there are.

3               Q.       Based upon your education, training  
4       and experience and your interviewing and your  
5       testing of Mr. O'Neal and your review of his  
6       scholastic records, do you have an opinion to a  
7       reasonable certainty as a psychologist as to the  
8       level of gradation of Mr. O'Neal's retardation?

9               A.       Yes, I do.

10              Q.       What is that opinion?

11              A.       He is mildly mentally retard.

12              Q.       Dr. Tureen, what the meant by the  
13       term "borderline" in speaking about mental  
14       retardation or a mental retardation evaluation?

15              A.       On our intellectual measures, such as  
16       the Weschsler scale or the Reynolds scale, there  
17       is an area of intellectual functioning that is  
18       below average but doesn't quite fall into the  
19       mentally retarded range.

20              Q.       Have you reviewed any prison records  
21       pertaining to Mr. O'Neal from the Mansfield  
22       Correctional Institute?

23              A.       Yes.

24              Q.       In reviewing those records, have you  
25       seen any indication that Mr. O'Neal has any

1 difficulty in following the rules of confinement  
2 in that institution?

3 A. No, I don't believe so.

4 Q. Does that in any way undercut the  
5 opinions that you have just given us concerning  
6 his mental retardation?

7 A. Not at all.

8 Q. Why do you say that?

9 A. We are not talking about somebody who  
10 is brain dead. We are talking about limitations.  
11 There is some learning that can take place, but  
12 it's at a certain level. For instance, he was a  
13 dishwasher. That doesn't take a high level of  
14 skill. There are people with Mr. O'Neal's level  
15 of functioning, who work under supervised  
16 situations, and can function well under  
17 structured, supervised situations, which is the  
18 situation in prison.

19 Q. Let me refer to your 2005 report.  
20 The last sheet or one of the last sheets in the  
21 report is entitled "WAIS-III Summary Report." Do  
22 you see where I'm referring, Doctor?

23 A. Yes.

24 Q. Can you explain how that particular  
25 page should be read to the Court?

1           A.     The most important number there or  
2     three numbers there are the verbal performance in  
3     full scale IQs, which are described as  
4     "borderline, extremely low, and extremely low."  
5     The extremely low is in the retarded range. Okay.  
6     As I said, it's kind of a political correctness  
7     that people don't like to use the term mental  
8     retardation as much as they did in the past,  
9     extremely low becomes the synonym for mental  
10    retardation.

11                The important point that I tried to  
12    make earlier is, if you look at those three  
13    scores, they are not statistically significantly  
14    different.

15                The true performance -- if you look  
16    at the point where it says "95 percent confidence  
17    interval," the true score lies in between those  
18    intervals. It could just as well be 64 or 72.

19           Q.     In relation to your work in this  
20    case, have you had opportunity, Dr. Tureen, to  
21    review a written report prepared by Dr. Nelson?

22           A.     Yes, I did.

23           Q.     Is there anything in Dr. Nelson's  
24    report that has caused you to change any of the  
25    opinions that you have expressed for the Court

1 today?

2 A. No. In fact, I think for the most  
3 part, except for the final conclusion, he and I  
4 are agreeing based upon the information that we  
5 have.

6 Q. Have you reviewed your testimony  
7 given at Mr. O'Neal's trial back in 1995 in  
8 preparation for your testimony today?

9 A. Yes.

10 Q. Are the opinions that you have  
11 expressed today are consistent with the testimony  
12 that you gave at that time?

13 A. I believe they are.

14 MR. KRUMHOLTZ: Nothing further, your  
15 Honor. Thank you.

16 THE COURT: Cross-examination?

17 MS. MULLEN: Thank you, Judge.

18 CROSS-EXAMINATION

19 BY MS. MULLEN:

20 Q. Hello, Dr. Tureen.

21 A. Hello.

22 Q. According to your discussion of  
23 summary report in regards to the 95 percent  
24 confidence interval, that means IQ testing is not  
25 exact. Would that be correct?

1           A.     IQ testing is based on -- I can't say  
2     yes or no. If I may explain.

3           Q.     Okay. Sure.

4           A.     It's a statistical process. And when  
5     you use statistics, you get a range. You get what  
6     is known as standard error of measurement. And  
7     for the full scale IQ -- I don't remember the  
8     exact standard error of measurement, but it's  
9     somewhere between two and three. So, if you look  
10    at the full scale IQ of 67, that real number is  
11    something like 65, or it's like 68, somewhere in  
12    that range.

13          Q.     So on your verbal scale where it says  
14    "67 to 77," is that the confidence?

15          A.     That's a different confidence level.  
16    That's not the standard error of measurement.

17          Q.     Is it correct to generalize that the  
18    IQ score that you come up there can vary either  
19    five degrees over or five degrees under?

20          A.     They can, yes.

21          Q.     So an IQ score of 71 could be 76 or  
22    66?

23          A.     It's possible, sure. Again, I think  
24    the important point that I have been trying to  
25    make here is the consistency of the pattern from a

1 very early age on IQ measures.

2 Q. The point that I'm trying to make is  
3 it could be anywhere in that range, so we can't  
4 say for sure the exact number. Would that be  
5 correct?

6 A. That would be correct except that  
7 traditionality that we take the number, and if you  
8 read reports of -- as in this report -- if you  
9 read reports that state what the IQ is, you state  
10 it's 67, not that it's in a range from X to Y.

11 Q. But it's understood that there is a  
12 range?

13 A. There is always a range, yes,  
14 statistically.

15 Q. So in regards to back Dr. Chiappone's  
16 administering the Weschsler back in 1994, he came  
17 up with 71?

18 A. Yes.

19 Q. That could be 76, or it could be --  
20 whatever five from 71 is -- 66, right?

21 A. It could be.

22 Q. So is it correct to say that we don't  
23 know his exact score?

24 A. No, we don't, but we are also dealing  
25 with the best guess, and that number is the best



1 guess. Okay. It's a statistical guess, but it's  
2 still the best guess.

3 Q. Do you agree that even with an IQ  
4 below 70, there would be no diagnosis of mental  
5 retardation without some significant impairment in  
6 adaptive functioning?

7 A. Yes.

8 Q. So you almost need to look at the  
9 adaptive functioning in order to come to a  
10 conclusion. Would that be correct?

11 A. Yes.

12 Q. Do you agree with the *DSM-IV* -- I'm  
13 sure that you're familiar with that -- that mental  
14 retardation is not necessarily a lifetime  
15 disorder?

16 A. It depends. You're going to have to  
17 define that for me, or they are going to have to  
18 define it for me.

19 Q. Well, I only know what they say in  
20 just a couple sentences on Page 44. "Mental  
21 retardation is not necessarily a lifelong  
22 disorder. Individuals who had mild mental  
23 retardation early in their lives, manifested by  
24 failure in academic learning tasks, may, with the  
25 appropriate training and opportunities, develop